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Military Courts-Martial: An Overview

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Summary

The recent reports of abuse of prisoners held by the military in Iraq have raised questions about how the armed forces discipline and punish those who commit crimes or violate the rules and regulations of the military. Congress, under the authorities vested in it, enacted a code of military laws, the Uniform Code of Military Justice (UCMJ). The President, by Executive Order, has, in turn, established standards and procedures for prosecuting violators of the UCMJ and certain other laws. Military criminal courts are known as courts-martial. This report provides an overview of military courts-martial: who can be tried, potential punishments, and the appeals process.

Background

Under Article I, sec. 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, the Congress has enacted the Uniform Code of Military Justice (UCMJ),¹ the code of military criminal laws applicable to all military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM), which was prescribed by Executive Order 12473 (April 13, 1984). The Manual for Courts-Martial contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE),² and the UCMJ. The MCM covers almost all aspects of military law.³ Military criminal trial courts are known as courts-martial. Military courts are not considered Article III courts but instead are established pursuant to Article I of the

¹ Codified in 10 U.S.C. §§ 801-941.

² Rules of procedure and rules of evidence for courts-martial are established by the President as authorized by Art. 36, UCMJ (10 U.S.C. § 836).

³ Each military service supplements the MCM to meet its individual needs. The Army has Army Regulation 27-10; the Navy and Marine Corps have the Manual for the Judge Advocate General; and the Air Force has Air Force Instructions.

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Constitution.⁴ This report provides an overview of military courts-martial. It does not cover administrative disciplinary options such as nonjudicial punishments.⁵

Jurisdiction

In order to be tried by a court-martial, the court-martial must have jurisdiction over the person. Jurisdiction of a court-martial does not depend on where the offense was committed. Rather, it depends solely on the status of the accused as a member of the armed forces on active duty, whether in the regular or reserve component.⁶ In addition to servicemembers, several other categories of individuals may be tried by courts-martial including retired members of a regular component of the armed forces entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during “times of war,” limited to declared wars.⁷

Types of Offenses

Courts-martial try “military offenses,” which are listed in the punitive articles of the UCMJ and are codified in 10 U.S.C. 877 et seq.⁸ Some “military offenses” have a civilian analog, but a number of “military offenses” are specific to the military.⁹ The President is authorized to prescribe the punishments which a court-martial may impose within the limits established by Congress.¹⁰ In addition, a servicemember may be tried at a court-martial for offenses not specifically covered by the UCMJ. Article 134—General Article¹¹ states that all “crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense.” This means that any state or federal offense for which there is no analogous crime in the UCMJ may be assimilated

⁴ Article III of the U.S. Constitution addresses the judicial powers of the United States and contains certain requirements such as life tenure for judges. Article I of the U.S. Constitution addresses the legislative powers of the United States which are vested in the Congress. Article I courts are not subject to all the structural and procedural requirements that pertain to Article III courts.

⁵ Nonjudicial punishment allows military commanders to discipline servicemembers for minor offenses without having to face a court-martial. It is frequently referred to as “Article 15’s,” because of the relevant UCMJ article. Art. 15, UCMJ; 10 U.S.C. § 815.

⁶ *See Solorio v. United States*, 483 U.S. 435, 447 (1987).

⁷ Art. 2, UNIFORM CODE OF MILITARY JUSTICE, MCM (2002 ed.); 10 U.S.C. § 802.

⁸ The punitive articles run from Arts. 77 through 134 of the UCMJ; 10 U.S.C. §§ 877-934.

⁹ Military specific offenses include mutiny or sedition (Art. 94, UCMJ); insubordinate conduct (Art. 91, UCMJ); failure to obey an order (Art. 92, UCMJ); cruelty and maltreatment (Art. 93, UCMJ); and misconduct as a prisoner (Art. 105, UCMJ).

¹⁰ Art. 56, UCMJ; 10 U.S.C. § 856.

¹¹ 10 U.S.C. § 934.

and tried at a court-martial. The potential punishments for violations of Article 134 are the same as the punishments applicable to the corresponding civilian offense.

Investigation

When a servicemember has reportedly committed an offense, the accused's immediate commander will conduct an inquiry into the alleged offense.¹² This inquiry will vary according to the offense(s) alleged and the complexity of the case. It may range from an examination of the charges and an investigative report or summary of expected evidence to a more extensive investigation. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials. Once evidence has been gathered and the inquiry is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,¹³ (3) imposing nonjudicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.¹⁴ Preferral of charges is the first formal step in a court-martial. Preferral of charges consists of drafting a charge sheet containing the charges and specifications¹⁵ against the accused. The charge sheet must be signed by the accuser¹⁶ under oath before a commissioned officer authorized to administer oaths.¹⁷ Once charges have been preferred they may be referred¹⁸ to one of three types of courts-martial: summary, special or general.¹⁹ The seriousness of the offenses alleged generally determines the type of court-martial. The court-martial must be convened by the convening authority,²⁰ who will generally be the commissioned officer, or successor, in command of the unit the accused is attached to.²¹

Types of Courts-Martial

Summary Courts-Martial. The summary court-martial can adjudicate minor offenses allegedly committed by enlisted servicemembers. It can adjudge maximum punishments of thirty days confinement, hard labor without confinement for 45 days, restriction to specified limits for 45 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade. In the case of enlisted members above pay

¹² RCM 303.

¹³ Administrative action can include separation from the military. *See* 10 U.S.C. §§ 1161 et seq.

¹⁴ RCM 306(c).

¹⁵ A specification is a plain and concise statement of the essential facts constituting the offense charged. RCM 307(c)(3).

¹⁶ Any person subject to the UCMJ may prefer charges as the accuser. RCM 307(a).

¹⁷ RCM 307(b).

¹⁸ Referral is the order that states that charges against an accused will be tried by a specific court-martial. RCM 601.

¹⁹ *See* RCM 401(c).

²⁰ RCM 504.

²¹ RCM 103(6).

grade E-4,²² the summary court-martial may not adjudge confinement or hard labor without confinement and can only reduce them to the next lower pay grade.²³ Summary courts-martial are composed of one commissioned officer who need not be a lawyer.²⁴ The accused must consent to the proceedings²⁵ and normally is not entitled to a lawyer.²⁶

Special Courts-Martial. The special court-martial can try any servicemember for any noncapital offense or, under presidential regulation, capital offenses.²⁷ This court-martial can be composed of a military judge alone, three members,²⁸ or a military judge and three members.²⁹ Contrary to civilian criminal trials, only two-thirds of the members of a court-martial need to agree as to the guilt of the accused for the accused to be found guilty. Otherwise, the accused is acquitted.³⁰ There are no “hung juries” in courts-martial.

Regardless of the offenses tried, the maximum punishment allowed at a special court-martial is confinement for one year, hard labor without confinement for up to three months, forfeiture of two-thirds pay per month for up to one year, reduction in pay grade and a bad-conduct discharge.³¹ Most often special courts-martial will try offenses considered misdemeanors. The accused is entitled to an appointed military attorney, a military counsel of his or her selection, or he or she can hire a civilian counsel at no expense to the government.³²

²² Paygrade E-4 consists of corporals or specialists (Army), petty officers 3rd class (Navy), corporals (Marine Corps), and senior airman (Air Force).

²³ RCM 1301; Art. 20, UCMJ; 10 U.S.C. § 820.

²⁴ Art. 16, UCMJ; 10 U.S.C. § 816.

²⁵ Art. 20, UCMJ; 10 U.S.C. § 820.

²⁶ *Middendorf v. Henry*, 425 U.S. 25 (1970).

²⁷ Arts. 16 & 19, UCMJ; 10 U.S.C. §§ 816, 819; RCM 201(f)(2)(A).

²⁸ Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused’s command.

²⁹ The accused has the right to choose the composition of the court-martial or whether he or she chooses to be tried by a military judge alone, a military judge and members or a panel of members. Enlisted servicemembers have the choice to request that the member’s panel include enlisted members. RCM 903.

³⁰ RCM 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. Art. 52, UCMJ; 10 U.S.C. § 852.

³¹ Art. 19, UCMJ; 10 U.S.C. § 819; RCM 201(f)(2)(B). A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may only be adjudged if a complete record of the proceedings and testimony has been made, defense counsel was appointed, and a military judge presided over the court-martial. If a military judge could not be appointed, a detailed written statement stating the reasons why must be submitted by the commander who convened the court-martial.

³² Art. 27, UCMJ; 10 U.S.C. § 827.

General Courts-Martial. A general court-martial is the highest trial level in military law and is usually used for the most serious offenses. It is composed of a military judge sitting alone, or five members and a military judge.³³ It can adjudge, within the limits prescribed for each offense, a wide range of punishments to include confinement, reprimand, forfeitures of up to all pay and allowances, reduction to the lowest enlisted paygrade, punitive discharge (bad conduct discharge, dishonorable discharge or dismissal), restriction, fines and, for certain offenses, death.³⁴ The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or the accused can hire a civilian counsel at no expense to the government.

Prior to the convening of a general court-martial, a pretrial investigation, more commonly known as the Article 32 hearing, must be conducted. The Article 32 hearing is the equivalent of a civilian grand jury, meant to assess the truth of the charges to ensure that there is a basis for prosecution.³⁵ An investigating officer, who must be a commissioned officer,³⁶ presides, and the accused has the same entitlements to counsel as in a special courts-martial. However, unlike in a civilian grand jury investigation where the accused has no access to the proceedings, the accused is afforded the opportunity to examine the evidence presented against him, cross-examine witnesses and present his own arguments.³⁷ If during the course of the investigation evidence surfaces that the accused committed an offense not charged, the investigating officer can recommend that more charges be brought against the accused.³⁸ Likewise, if the investigating officer believes that there is not enough evidence to support a charge, he can recommend that it be dismissed.

Once the Article 32 investigation is complete, the investigating officer will make recommendations to the convening authority (CA) via the CA's legal advisor. The legal advisor in turn, provides the CA with a formal written advice, known as the Article 34, UCMJ advice, as to the disposition of charges. The CA then determines whether to convene a court-martial or dismiss the charges.³⁹

Post-Trial Review

One of the unique aspects of the military justice system is the post-trial review by the CA. For convictions at a general or special court-martial that include a punitive

³³ Art. 16, UCMJ. The accused has the right to choose who he or she will be tried by with the exception of capital cases where members are required. See note 29, *supra*. and RCM 201(f)(1)(C).

³⁴ RCM 1003. It must be noted that there are restrictions on allowable punishments depending on a person's status as an officer or an enlisted servicemember.

³⁵ Art. 32, UCMJ; 10 U.S.C. § 832.

³⁶ RCM 405(d)(1).

³⁷ Art. 32(b)-(c), UCMJ; 10 U.S.C. § 832(b)-(c); RCM 405(f).

³⁸ Art. 32(d), UCMJ; 10 U.S.C. § 823(d); RCM 405(e).

³⁹ Art. 33-35, UCMJ; 10 U.S.C. §§ 833-835; RCM 407.

discharge,⁴⁰ the process starts with the review, the staff judge advocate (SJA), and a recommendation to the CA as to what action to take on the case. This is recognized as the accused's best hope for relief as the CA has broad powers to act on the case.⁴¹ Upon review of the record of trial and the SJA's recommendation, the CA may, among other remedies, suspend all or part of the sentence, disapprove a finding or conviction or lower the sentence.⁴² The CA may not increase the sentence. Once the CA takes action on the case, the conviction is ripe for an appeal.

In the case of summary court-martial or a court-martial where the service appellate courts do not have jurisdiction,⁴³ convictions will be reviewed by a judge advocate⁴⁴ to determine if the findings and sentence, as approved by the CA, are correct in law and fact.⁴⁵ If those criteria are met, the conviction is final. If not, the judge advocate will forward the case to a general court-martial CA for corrective action.⁴⁶ If the CA refuses to take corrective action, the case is referred to the Judge Advocate General for review.

Appellate Review

Convictions by a special or general court-martial are subject to an automatic⁴⁷ appeal to a service Court of Criminal Appeals if the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet or midshipman.⁴⁸ Appeal is mandatory when the sentence includes death. If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the Armed Forces⁴⁹ and ultimately the U.S. Supreme Court.⁵⁰ Review by these courts is discretionary.

⁴⁰ There are two kinds of punitive discharges: bad-conduct discharge and dishonorable discharge.

⁴¹ *United States v. Davis*, 58 M.J. 100, 102 (2003).

⁴² Art. 60, UCMJ; 10 U.S.C. § 860; RCM 1107.

⁴³ There are three service appellate courts: the Navy-Marine Corps Court of Criminal Appeals, the Army Court of Criminal Appeals and the Air Force Court of Criminal Appeals. A service appellate court will have jurisdiction in cases where the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal from service in the case of a commissioned officer, cadet or midshipman. Art. 66, UCMJ; 10 U.S.C. § 866.

⁴⁴ Art. 64, UCMJ; 10 U.S.C. § 864; RCM 1111, 1112 and 1306.

⁴⁵ Art. 64, UCMJ; 10 U.S.C. § 864; RCM 1112.

⁴⁶ Art. 64(c)(3), UCMJ; 10 U.S.C. § 864(c)(3); RCM 1112.

⁴⁷ Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to appeal. An appellant may not waive his right to appeal when the sentence includes death. RCM 1110.

⁴⁸ Art. 66, UCMJ; 10 U.S.C. § 866.

⁴⁹ See Art. 67, UCMJ; 10 U.S.C. § 867. The Court of Appeals for the Armed Forces (CAAF) is a civilian court composed of five civilian judges appointed by the President.

⁵⁰ Congress did not grant the U.S. Supreme Court jurisdiction over decisions of the CAAF until 1984. Military Justice Act of 1983, P.L. 98-209, 97 Stat. 1393, 28 U.S.C. § 1259.